

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHY JO KERANS,)	
)	No. CV-09-150-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 12, 16.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney David J. Burdett represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for the Defendant.

Plaintiff applied for disability insurance benefits (DIB) and Supplemental Security Income (SSI) in September 2006. (Tr. 121.) She alleged disability due to post traumatic stress disorder and depression with an onset date of January 31, 2006. (Tr. 114.) Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge (ALJ) R.S. Chester on September 3, 2008. (Tr. 30-71.) Plaintiff,

1 who was represented by counsel, and vocational expert Fred Cutler
2 testified. On October 22, 2008, ALJ Chester denied benefits; the
3 Appeals Council denied review, and this appeal followed (Tr. 12-29,
4 1-4.) Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

5 **STANDARD OF REVIEW**

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
7 court set out the standard of review:

8 The decision of the Commissioner may be reversed only if
9 it is not supported by substantial evidence or if it is
10 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
11 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a
13 preponderance. *Id.* at 1098. Put another way, substantial
14 evidence is such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion.
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
17 evidence is susceptible to more than one rational
18 interpretation, the court may not substitute its judgment
19 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
20 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
21 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,
23 resolving conflicts in medical testimony, and resolving
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
25 Cir. 1995). The ALJ's determinations of law are reviewed
26 *de novo*, although deference is owed to a reasonable
27 construction of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
34 The Commissioner's findings are upheld if supported by inferences
35 reasonably drawn from the evidence. *Batson v. Commissioner of*
36 *Social Sec.*, 359 F.3d 1190, 11193 (9th Cir. 2004). Nevertheless, a

1 decision supported by substantial evidence will be set aside if the
 2 proper legal standards were not applied in weighing the evidence and
 3 making the decision. *Browner v. Secretary of Health and Human*
 4 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial
 5 evidence to support the administrative findings, or if there is
 6 conflicting evidence that will support a finding of either
 7 disability or non-disability, the finding of the Commissioner is
 8 conclusive. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005);
 9 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

10 SEQUENTIAL PROCESS

11 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 12 requirements necessary to establish disability:

13 Under the Social Security Act, individuals who are
 14 "under a disability" are eligible to receive benefits. 42
 15 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 16 medically determinable physical or mental impairment"
 17 which prevents one from engaging "in any substantial
 18 gainful activity" and is expected to result in death or
 19 last "for a continuous period of not less than 12 months."
 20 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 21 from "anatomical, physiological, or psychological
 22 abnormalities which are demonstrable by medically
 23 acceptable clinical and laboratory diagnostic techniques."
 24 42 U.S.C. § 423(d)(3). The Act also provides that a
 25 claimant will be eligible for benefits only if his
 26 impairments "are of such severity that he is not only
 27 unable to do his previous work but cannot, considering his
 28 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential
 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and

1 detailed objective medical reports of h[is] condition from
2 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

3 STATEMENT OF FACTS

4 The facts of the case are set forth in detail in the transcript
5 of proceedings, and are briefly summarized here. Plaintiff was 38
6 years old at the time of the hearing. (Tr. 40.) She had a 9th grade
7 education, a high school equivalency degree and attended vocational
8 school to become a phlebotomist. (Tr. 42.) She has past relevant
9 work as a cashier/checker, fast food worker, phlebotomist and food
10 server. (Tr. 64-66.) At the time of the hearing, Plaintiff was a
11 widow and lived with her 18 year old son in a condominium. (Tr. 40.)
12 She testified she last worked in January 2006, when she quit her job
13 and moved into a women's shelter. (Tr. 50-51.) Plaintiff reported
14 she was in prison for a year for possession of methamphetamine and
15 cocaine. (Tr. 46.) She testified she had been drug free for ten
16 years, except for a relapse in March 2006. (Tr. 46-47.) She stated
17 she broke her two feet six weeks before the hearing, but that her
18 physical problems would not prevent her from working. (Tr. 60.)
19 She testified that "it is my head that keeps me from working."
20 (*Id.*)

21 ADMINISTRATIVE DECISION

22 The ALJ found Plaintiff was insured for DIB through March 31,
23 2008. At step one, he found Plaintiff had not engaged in
24 substantial gainful activity since January 31, 2006, her alleged
25 onset date. (Tr. 17.) At step two, he found Plaintiff had the
26 severe impairments of "post traumatic stress disorder (PTSD) with
27 possible panic disorder; depressive disorder; and history of
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1 substance addiction disorder (methamphetamine and heroin)." (*Id.*)
2 He found Plaintiff's "rule out" mental disorders and other possible
3 mental diagnoses in the record were non-severe. (Tr. 20.) He also
4 found Plaintiff's diagnosed osteoporosis, thyroid condition, and
5 lumbar disc problems were non-severe medically determinable
6 impairments, *i.e.*, they do not have a significant impact on her
7 ability to perform work activities. (Tr. 20-21.)

8 After a discussion of the medical evidence, the ALJ found
9 Plaintiff's impairments, alone or in combination, did not equal one
10 of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix
11 1 (Listings). (Tr. 17-22.) At step four, he determined Plaintiff
12 had the residual functional capacity (RFC) to work all exertional
13 levels, "limited to simple routine, and repetitive tasks" with
14 "limited interaction or non-collaborative interaction with public
15 and co-workers." (Tr. 22.) The ALJ found Plaintiff's statements
16 were not credible to the extent they were inconsistent with the RFC
17 findings. Considering vocational expert testimony, the ALJ found
18 Plaintiff could no longer perform her past relevant work. (Tr. 27.)
19 At step five, he found there was a significant number of jobs in the
20 general job category of hand packager that Plaintiff could perform;
21 therefore, she was not under a "disability" as defined by the Social
22 Security Act. (Tr. 27-28.)

23 ISSUES

24 The question presented is whether there is substantial evidence
25 to support the ALJ's decision denying benefits and, if so, whether
26 that decision is based on proper legal standards. Plaintiff
27 contends the ALJ erred when he: (1) found her physical impairments
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1 were non-severe at step two; (2) improperly evaluated the medical
2 evidence; (3) improperly assessed her credibility; (4) improperly
3 assessed her RFC; and (5) failed to include all her limitations in
4 the hypothetical presented to the VE at step five. (Ct. Rec. 13 at
5 9-13.)

6 DISCUSSION

7 A. Credibility

8 Plaintiff argues without specificity that the ALJ's credibility
9 determination "is not based on any convincing evidence." (Ct. Rec.
10 13 at 11.) An independent review of the record does not support
11 this assertion. The ALJ thoroughly summarized Plaintiff's
12 testimony, written questionnaires, three function reports and
13 statements to medical providers and made extensive, specific
14 credibility findings explaining why he discounted Plaintiff's
15 allegations to the extent they were inconsistent with the final RFC
16 assessment. (Tr. 23-26.)

17 Although credibility determinations are the sole province of
18 the ALJ, when the adjudicator finds a claimant's statements
19 regarding the severity of impairments and limitations are not
20 credible, he must make a credibility determination with findings
21 sufficiently specific to permit the court to conclude the ALJ did
22 not arbitrarily discredit claimant's allegations. *Richardson*, 402
23 U.S. at 400; *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
24 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
25 banc); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).
26 Nonetheless,

27 [a]n ALJ cannot be required to believe every allegation of
28 disabling pain, or else disability benefits would be

1 available for the asking, a result plainly contrary to 42
2 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
3 the claimant introduces medical evidence showing that he
4 has an ailment reasonably expected to produce some pain;
many medical conditions produce pain not severe enough to
preclude gainful employment.

5 *Fair*, 885 F.2d at 603. Further, in assessing credibility, the ALJ
6 does not need to totally reject or accept a claimant's statements.
7 Based on consideration of all the evidence in the record, the ALJ
8 may find the claimant's statements regarding limitations, symptoms,
9 and pain credible "to a certain degree." SSR 96-7p.

10 If there is no affirmative evidence that the claimant is
11 malingering, the ALJ must provide "clear and convincing" reasons for
12 rejecting the claimant's allegations regarding the severity of
13 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
14 ALJ engages in a two-step analysis in deciding whether to admit a
15 claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d
16 1273, 1281 (9th Cir. 1996).

17 Under the first step, the ALJ must find the claimant has
18 produced objective medical evidence of an underlying "impairment,"
19 and that the impairment, or combination of impairments, "could
20 reasonably be expected to produce pain or other symptoms." *Cotton*
21 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). Once the *Cotton* test
22 is met, the ALJ must evaluate the credibility of the claimant. In
23 addition to ordinary techniques of credibility evaluation, the ALJ
24 may consider the following factors when weighing the claimant's
25 credibility: the claimant's reputation for truthfulness;
26 inconsistencies either in her allegations of limitations or between
27 her statements and conduct; daily activities and work record; and
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1 testimony from physicians and third parties concerning the nature,
2 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
3 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d 597 at n.5.
4 The ALJ may also consider an unexplained failure to follow treatment
5 recommendations and testimony by the claimant "that appears less
6 than candid." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
7 2008). If the ALJ's credibility finding is supported by substantial
8 evidence in the record, "the court may not engage in
9 second-guessing." *Thomas*, 278 F.3d at 959; *Fair*, 885 F.2d at 604.

10 Here, the ALJ found Plaintiff's statements that she was fearful
11 of leaving home due to panic attacks were inconsistent with her
12 written answers in the record and her reports to examining medical
13 sources. For example, she reported going on two cross-country trips
14 by airplane to Tennessee within the last year without adverse
15 incidents. (Tr. 25, 62-63.) He also found she did not mention an
16 inability to get along with other people to health providers or in
17 written reports, and she stated she enjoyed working with her
18 phlebotomy clients. (Tr. 25, 148-49, 232.) Other inconsistencies
19 referenced by the ALJ were reports that she spent time out of the
20 house socializing routinely with neighbors, walking her dog, going
21 to the store. (Tr. 25.) In addition, the ALJ noted inconsistencies
22 in her testimony regarding mental health treatment and side effects
23 of medication. (Tr. 26.) Significantly, Plaintiff was less than
24 candid about prior incarcerations and her use of illegal drugs
25 within the last ten years, failing to report relapses involving
26 heroin to examining psychologists and the ALJ at the hearing. (Tr.
27 25-26.) Lack of candor involving drug abuse is in itself a "clear
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1 and convincing" reason to discount credibility. *Verduzco v. Apfel*,
2 188 F.3d 1087, 1090 (9th Cir. 1999). As noted by the ALJ, Plaintiff
3 was also inconsistent regarding her continuation of an abusive
4 relationship and history of self-mutilation. (Tr. 26.)

5 Plaintiff has made no showing that the ALJ erred in his
6 reasoning. The ALJ's credibility findings are specific, legally
7 sufficient, and supported by the entire record. (See, e.g., Tr. 46-
8 47, 178, 231-32, 269.)

9 **B. Step Two: Severe Impairments**

10 Plaintiff argues the ALJ erred at step two when he found her
11 diagnosed osteoporosis and lumbar problems were non-severe. (Ct.
12 Rec. 13 at 9.) To satisfy step two's requirement of a severe
13 impairment, the claimant must prove the existence of a physical or
14 mental impairment by providing medical evidence consisting of signs,
15 symptoms, and laboratory findings; the claimant's own statement of
16 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908;
17 *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985). The ALJ then
18 determines whether the medically determinable impairment
19 significantly limits her physical or mental ability to do basic work
20 activities. 20 C.F.R. §§ 404.1520(c); 416.920(c). The fact that a
21 medically determinable condition exists does not automatically mean
22 the symptoms are "severe," or "disabling" as defined by the Social
23 Security regulations. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*,
24 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir.
25 1985).

26 An impairment may be found to be non-severe when "medical
27 evidence establishes only a slight abnormality or a combination of
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1 slight abnormalities which would have no more than a minimal effect
2 on an individual's ability to work." SSR 85-28.¹ Medical evidence
3 alone is evaluated in assessing severity. (*Id.*) "The severity
4 requirement cannot be satisfied when medical evidence shows that the
5 person has the ability to perform basic work activities, as required
6 in most jobs." Basic work activities include "walking, standing,
7 sitting, lifting, pushing, pulling, reaching, carrying, or handling;
8 seeing, hearing, speaking; understanding, carrying out and
9 remembering simple instructions; responding appropriately to
10 supervision, coworkers, and usual work situation." *Id.*

11 Here, the ALJ did not err in his step two findings. As found
12 by the ALJ, Plaintiff specifically stated at the hearing that her
13 physical impairments did not prevent her from working. (Tr. 60-61.)
14 In addition, she did not include physical limitations caused by the
15 diagnosed lumbar problems or osteoporosis in her application for
16 benefits. (Tr. 20, 114, 140.) Further, Plaintiff does not
17 reference medical evidence to support her contention that her
18 physical impairments significantly limit her ability to perform
19 basic work activities. Plaintiff's statements on appeal, which are
20 inconsistent with her statements to the ALJ, are insufficient to
21 establish severity at step two. SSR 85-28.

22 C. RFC Assessment

23 Plaintiff next contends the ALJ's RFC assessment is erroneous
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25 ¹ The Supreme Court upheld the validity of the Commissioner's
26 severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*,
27 482 U.S. 137, 153-154 (1987).
28

1 because her physical impairments prevent her from working at heavy
2 and medium exertion levels and her mental impairments were more
3 limiting than assessed by the Commissioner. (Ct. Rec. 13 at 9-11.)
4 As discussed above, the ALJ did not err in finding Plaintiff's
5 physical impairments were non-severe.² Further, an independent
6 review of the record indicates the ALJ's RFC determination is
7 supported by substantial evidence in the entire record.

8 In evaluating a disability claim, the adjudicator must consider
9 all medical evidence provided. The final determination regarding a
10 claimant's ability to perform basic work is the sole responsibility
11 of the Commissioner. 20 C.F.R. §§ 404.1546, 416.946; SSR 96-5p (RFC
12 assessment is an administrative finding of fact reserved to the
13 Commissioner). In evaluating medical source opinions, a treating or
14 examining physician's opinion is given more weight than that of a
15 non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592
16 (9th Cir. 2004). If the treating or examining physician's opinions
17 are not contradicted, they can be rejected only with "clear and
18 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1995). If contradicted, the ALJ may reject the opinion with
20 specific, legitimate reasons that are supported by substantial
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22
23 ² Even assuming the evidence established Plaintiff could not
24 perform medium or heavy work, this claimed RFC error is harmless
25 because the VE identified jobs in the national economy Plaintiff
26 could perform at a light exertion level. (Tr. 68.) Correction of
27 the error would not alter the final determination of non-disability.
28 *See Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir. 1995).

1 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
2 F.3d 1453, 1463 (9th Cir. 1995). No special significance is given
3 to a medical source opinion on issues reserved to the Commissioner.
4 20 C.F.R. §§ 404.1527(e), 416.927(e). Further, where ALJ's
5 determination is a rational interpretation of the evidence, the
6 court will not substitute its judgment for that of the Commissioner.
7 *Tackett*, 180 F.3d at 1097.

8 Plaintiff argues the ALJ did not give proper weight to the
9 opinions of examining psychologist Joyce Everhart, Ph.D., and non-
10 examining agency psychologist, Sean Mee, Ph.D.,³ in assessing her
11 RFC. (Ct. Rec. 13 at 10-11.) In support of this argument,
12 Plaintiff references only Dr. Everhart's comment that Plaintiff
13 would have difficulties with persistence "which could interfere with
14 attendance" during the workweek. (*Id.* at 10.) Plaintiff also
15 asserts the ALJ did not properly include Dr. Mee's findings that she
16 may have problems with new and complex material and "may also become
17 distracted by coworkers and would perform better in work environment
18 with few and familiar employees." (Ct. Rec. 13 at 10.) However, an
19 independent review of the reports prepared by Dr. Everhart and Dr.

21
22 ³ The findings of non-examining agency psychologists must be
23 treated as expert opinion evidence of non-examining sources by the
24 ALJ, who can give weight to these opinions only insofar as they are
25 supported by evidence in the case record. *SSR 96-6p*. The opinion of
26 a non-examining physician may be accepted as substantial evidence if
27 it is supported by other evidence in the record and is consistent
28 with it. *Lester*, 81 F.3d at 830-31; *Andrews*, 53 F.3d at 1043.

1 Mee reveals no reversible error in the ALJ's evaluation of their
2 medical source opinions, or in his final RFC determination.

3 In February 2007, Dr. Everhart examined Plaintiff and
4 administered Trails A and B testing which, as noted by the ALJ,
5 scored within normal limits. (Tr. 26, 230-34.) Dr. Everhart
6 observed Plaintiff as mildly depressed, anxious and evasive in her
7 answers. (Tr. 232, 233.) Although Dr. Everhart opined Plaintiff
8 was likely to have some difficulty with persistence, she did not
9 opine Plaintiff was incapable of all work. Rather, she noted
10 Plaintiff's conversation skills were good, thought process was
11 logical and coherent, and attention, concentration and intellectual
12 ability were within normal limits. (*Id.*) Objective testing did not
13 show difficulty with executive function, but Dr. Everhart concluded
14 Plaintiff would have difficulty working with the public as well as
15 difficulty with complex multi-step tasks. (*Id.*) The ALJ's RFC
16 assessment reasonably reflects Dr. Everhart's findings, in that he
17 found Plaintiff (1) could not interact with the public or work in a
18 collaborative setting, and (2) was restricted to simple, routine,
19 repetitive tasks. (Tr. 22.) As is the case with Dr. Everhart's
20 findings, the ALJ also factored the moderate limitations identified
21 and explained by Dr. Mee into his RFC assessment. (*Id.*, 298-300.)
22 Further, the ALJ's RFC assessment properly took into account the
23 record in its entirety and Plaintiff's credible statements.

24 The ALJ was not obliged to reject the opinions of Dr. Mee or
25 Dr. Everhart because they are consistent with the final RFC
26 determination and the requirements of the jobs identified by the VE.
27 The RFC assessment represents a reasonable interpretation of the
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1 record as a whole and thus may not be disturbed. *Tackett*, 180 F.3d
2 at 1097.

3 **D. Step Five - Vocational Expert Testimony**

4 At step five, the burden of proof shifts to the Commissioner to
5 show there are a significant number of jobs in the national economy
6 that Plaintiff can still perform. *Kail v. Heckler*, 722 F.2d 1496,
7 1498 (9th Cir. 1984). The ALJ may rely on vocational expert
8 testimony if the hypothetical presented to the expert includes all
9 functional limitations supported by the record and found credible by
10 the ALJ. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005.)
11 Plaintiff contends the Commissioner did not meet his burden because
12 (1) he did not include all of her limitations in the hypothetical
13 presented to the VE, and (2) he disregarded the VE's opinion that
14 one to two days of absenteeism per month would preclude work. (Ct.
15 Rec. 13 at 12.)

16 As discussed above, the ALJ properly discounted Plaintiff's
17 allegations of agoraphobia and inability to leave her home. (Tr.
18 25.) He also discounted the severity of her self-reported symptoms,
19 due, in part, to her lack of candor regarding her drug use. (Tr.
20 26.) Further, the ALJ's step two findings and RFC determination are
21 legally sufficient and supported by substantial evidence.

22 The ALJ was not obliged to include limitations in the
23 hypothetical that are not supported by the record. See *Osenbrock v.*
24 *Apfel*, 240 F.3d 1157, 1164 (9th 2001). Plaintiff cites no evidence
25 to support inclusion of absenteeism from work two times a month.
26 The hypothetical upon which the VE based his opinions is identical
27 to the ALJ's final RFC, which is supported by the record. (Tr. 66.)
28

1 The VE testified the hypothetical individual could perform light,
2 unskilled jobs in the generic category of hand packaging jobs, which
3 exist in significant numbers in the national economy. (Tr. 68.)
4 The ALJ did not err in relying on this testimony. *Bayliss*, 427 F.3d
5 at 1217.

6 **CONCLUSION**

7 The Commissioner's decision is supported by substantial
8 evidence and is not based on legal error. Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
11 **DENIED.**

12 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
13 **Rec. 16**) is **GRANTED.**

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. The file
16 shall be **CLOSED** and judgment entered for **Defendant.**

17 DATED March 30, 2010.

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19 S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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